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September 28, 2007 70008.00002

VIA ECF

Hon. A. Kathleen Tomlinson
United States Magistrate Judge
United States District Court, Eastern District of New York
100 Federal Plaza, P.O. Box 9014
Central Islip, NY 11722-9014

Re: *FragranceNet.com, Inc. v. FragranceX.com, Inc.*, CV-06-2225

Dear Judge Tomlinson:

We represent plaintiff FragranceNet.com, Inc. in this copyright infringement action and submit this request for a protective order pursuant to Fed. R. Civ. P. 26(c) limiting the scope of the deposition topics noticed by FragranceX.com, Inc. ("defendant") pursuant to Rule 30(b)(6), Fed. R. Civ. P. A copy of defendant's deposition notice is attached hereto as Exhibit A.

Although relevancy for discovery purposes frequently is construed somewhat broadly, "discovery is not without ultimate and necessary boundaries." *In re Lloyd's American Trust Fund Litigation*, No. 96 Civ. 1262 (RWS), 1998 WL 50211, at *17 (S.D.N.Y. Feb. 6, 1998). The proponent of discovery still must make a "threshold showing of relevance before the opposing party is obligated to open its books and records on sensitive topics not at issue in the litigation. *Fine v. Facet Aerospace Products Co.*, 133 F.R.D. 439, 443 (S.D.N.Y. 1990).

Many, if not a majority, of the topics in defendant's notice extend far beyond any issue that is relevant to the parties' claims and defenses. *See, e.g.*, *Collens v. City of New York*, 222 F.R.D. 249, 253-54 (S.D.N.Y 2004) (denying discovery on topics for which "[t]here is no basis for believing that the information would lead to the discovery of admissible evidence relevant to the plaintiff's claims."). The scope of defendant's discovery must be justified by a direct nexus between the discovery demands and the claims at issue in this litigation. *Devlin v. Transportation Communications Int'l Union*, 95 Civ. 10838 JFK JC, 2000 WL 28173, at *6 (S.D.N.Y. Jan. 14, 2000); *see also Gucci America, Inc. v. Costco Companies*, No. 98 Civ. 5613 RLC FM, 2000 WL 60209, at *7 (S.D.N.Y. Jan. 24, 2000) (limiting topic in plaintiff's Rule

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30(b)(6) notice so as not unduly to protract discovery or turn this case into a "search and destroy mission".)

Rule 26(c) authorizes a court, for good cause shown, to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including… that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters." Fed. R. Civ. P. 26(c)(4). Here, the following topics go far beyond the scope of this action as defined by the pleadings, are overbroad, irrelevant, unduly burdensome and not reasonably calculated to lead to admissible evidence.

Topic No. 4(e): The making of the Registered Photographs, including without limitation, … (e) the expense of making the Registered Photographs.

The cost incurred in creating a work has no bearing on its copyrightability. Invaluable works of art frequently cost little more than the price of a brush, paint and a canvas A work's value -- to the plaintiff as well as to the defendant who copies it -- is determined by the marketplace, not by the cost of raw materials.

Topic No. 6: Plaintiff's sales of each product sold by plaintiff since the creation of the Web site offered for sale by plaintiff on or through the Website; and

Topic No. 8: All revenue generated as a result of the use of the Registered Photographs on the Web site, as alleged in paragraph 1 of the Second Amended Complaint.

Plaintiff does not seek its own damages, *i.e.*, pecuniary loss. It seeks defendant's profits. These topics cannot lead to relevant or admissible evidence. Moreover, Topic No. 6 seeks financial information relating to the sale of *all* products on plaintiff's Web site, and is not limited to those corresponding to the photographs in issue. Topic No. 6 is burdensome, overbroad and irrelevant. Topic No. 8 is utterly irrelevant in that plaintiff does not seek damages based on its own pecuniary harm. Having removed that from the case, defendant should not be permitted to ask any questions relating to plaintiff's financial or sales information. They cannot have any bearing on this action.

Topic No. 10: The efforts and expenditures alleged in paragraph 11 of the Second Amended Complaint, and the time, effort and money referred to in paragraph 12 of the Second Amended Complaint; and

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Topic No. 11: The market share or other indicia of success of plaintiff's on-line perfume store, as alleged in paragraph 11 of the Second Amended Complaint.

The investment plaintiff has made in its business and its level of success cannot have anything to do with whether defendant has infringed plaintiff's copyrights and what defendant's profits were. Defendant asks this Court to condone a fishing expedition into plaintiff's financial affairs with no justification and no limits. Discovery is not symmetrical. Defendant's profits and the shortcuts its infringing conduct allowed it to take are in play, whether plaintiff invested millions or pennies in its business, and whether plaintiff is a market leader or a start-up. This Court should not allow defendant, a direct competitor of plaintiff, with no justification, to get into the most sensitive areas of plaintiff's business that have no relationship to this case. Defendant already has taken enough from plaintiff.

Plaintiff's counsel has conferred with defendant's counsel on September 6 and again on September 19, 2007 in an effort to resolve the above dispute without the need for court intervention but has not been successful. For the foregoing reasons, plaintiff respectfully requests that defendant be prohibited from inquiring into the subjects contained in topics 4(e), 6, 8, 10 and 11 of its notice under Rule 30(b)(6).

Respectfully submitted,

Robert L. Sherman

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of PAUL, HASTINGS, JANOFSKY & WALKER LLP
RLS/lr

cc: David Rabinowitz, Esq. (Via Fax: 212-554-7700)